**TANG HENG HUA** A

**v.**

**TANAH MANIS REALTY SDN BHD**

HIGH COURT MALAYA, PULAU PINANG B
VAZEER ALAM MYDIN MEERA JC
[CIVIL APPEAL NO: 12B-370-2009]
11 AUGUST 2010

***LANDLORD AND TENANT:*** *Recovery of possession - Notice to quit - Whether notice valid and binding on tenant - Whether tenant's unsolicited payment of 30 months' rent into landlord's bank account on receipt of notice to quit revived tenancy - Whether tenant had option to purchase demised property - Whether tenant acquired equitable interest in property for doing renovation works* C

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The respondent/plaintiff owned three lots of land together with a bungalow erected thereon ('the property'). The appellant/defendant was the tenant of the property and used it for various business activities including used-car dealings, car bodywork and repair and auto accessories. The last tenancy agreement between the parties expired on E
30 June 2000 after which date the appellant continued to rent and occupy the property as a monthly tenant on the same terms as contained in the expired agreement. By letter dated 5 October 2001 ('the notice to quit'), the respondent's solicitors terminated the tenancy and required the appellant to quit and deliver up vacant possession no later than F
31 January 2002. In the said letter, the solicitors informed the appellant that the respondent did not wish to accept any more rental payments after the notice to quit was issued. However, after the issuance of the notice to quit, the appellant, who had all the while paid his monthly rental either by cash or cheque, banked into the respondent's account RM54,000 as rental payment. This payment did not have the knowledge G
or acquiescence of the respondent. The respondent transferred and placed the RM54,000 in the account of its solicitor as stakeholder when the appellant refused to accept the return of the same. As the appellant failed to quit the property as required, the respondent filed proceedings in the sessions court for, *inter alia*, recovery of vacant possession, H
mesne profit/double rental, interest and damages. The court granted judgment to the respondent. Against that decision, the appellant appealed to the High Court. The appellant contended that (i) his payment of the RM54,000 into the respondent's bank account after the issuance of the notice to quit revived the tenancy (ii) that he had an oral agreement with I

A a director-cum-50% shareholder of the respondent for an option ('the option') to purchase the property and (iii) that the renovation works he had carried out on the property gave him an equitable interest therein.

**Held (dismissing the appeal):**

B **(1)** The sessions court was right in holding that the unilateral payment of RM54,000 did not revive the tenancy and that the notice to quit was valid and binding on the appellant. (para 17)

**(2)** There was no evidence of a fresh tenancy between the parties and
C the respondent's conduct in attempting to return the monies deposited in its account clearly showed there was never any intention on its part to waive the notice to quit. (para 22)

**(3)** The alleged option to purchase was an afterthought on the appellant's part to avoid having to surrender vacant possession of
D the property as required by the notice to quit. There was no document evidencing the option and, apart from the appellant's own testimony, absolutely no evidence to support the claim in this regard. (paras 26, 29 & 33)

E **(4)** The appellant had not filed any claim in court to support his contention of such an option being granted to him despite ten years having lapsed since it was allegedly granted. Therefore, any cause of action he may have had would have been time-barred in 2008. If indeed there was an option to purchase, the appellant ought to
F have acted on that right. (para 30)

**(5)** The renovation works carried out by the appellant on the property breached both his tenancy agreement with the respondent as well as the law. They were done for his benefit to carry out business on the property. He could not claim any equitable interest in the
G property as a result of the renovations and, in fact, was obliged to restore the property to its original condition upon expiry of the tenancy. (paras 37 & 48)

**Case(s) referred to:**

*Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1999] 6 CLJ 487 HC* ***(refd)***
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*Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC* ***(refd)***

*Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC* ***(refd)***

*Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal [1997] 3 CLJ 504 CA* ***(refd)***
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*Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA* ***(refd)***
*Lowenthal v. VanHoute & Anor 1 KB [1947] 342* ***(refd)***
*Mok Deng Chee v. Yap See Hoi & Ors [1981] CLJ 124; [1981] CLJ (Rep) 69 FC* ***(refd)***
*Saadian Karim v. Ong Ting Chai [1996] 1 LNS 96 HC* ***(refd)***
*Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 4 CLJ 217 CA* ***(refd)***
*Smith v. Hughes [1871] LR 6 QB 597* ***(refd)***
*Soon Peng Yam (Pte) Ltd v. Grant Irene Nee Chia Kim Lear [1984] 1 CLJ 332; [1984] 2 CLJ (Rep) 691 HC* ***(refd)***
*Tay Kian Hock v. Kewangan Bersatu Bhd [2002] 8 CLJ 982 HC* ***(refd)***
*Yii Chee Ming v. Teo Ah Khing & Anor [2007] 4 CLJ 78 HC* ***(refd)***

**Legislation referred to:**
Civil Law Act 1956, s. 28(4)(a)
Evidence Act 1950, s. 101
Street, Drainage & Building Act 1974. s. 72(1), (6)

*For the appellant/defendant - Daphne Choy; M/s Choy & Assocs*
*For the respondent/plaintiff - Karin Lim Ai Ching (Dominic Pillai with her); M/s Presgrave & Matthews & Co*

*Reported by Ashok Kumar*

## JUDGMENT

**Vazeer Alam Mydin Meera JC:**

**[1]** This is an appeal from the decision of the Sessions Court, Georgetown after full trial.

### The Facts

**[2]** The plaintiff (respondent) is the registered proprietor of the properties known as Lot No. 1340, Lot 1341 & Lot 282 (held under Geran No. 15242, 15243 & 29970) Seksyen 1, Daerah Timur Laut, Bandar Tanjung Tokong, Pulau Pinang, together with a bungalow erected thereon bearing postal address No. 99, Jalan Tanjung Tokong, Penang (hereinafter referred to as "the property")

**[3]** The defendant has been in occupation of the property as a tenant since 1987. The last tenancy agreement entered into between the parties was the tenancy agreement dated 11 January 1999 (hereinafter referred to as "the tenancy agreement") which was for a fixed period of two years commencing on 1 July 1998 and expiring on 30 June 2000. The monthly rental was RM1,800.

**[4]** The defendant had used the property to carry out business as used car dealer and car bodywork and repair workshop as well as dealing in auto accessories. The defendant has carried out structural renovation works on the property.

## Plaintiff's Case

**[5]** The plaintiff's case is that upon the expiry of the tenancy agreement on 30 June 2000, the defendant continued to rent and occupy the property as a monthly tenant based on the same terms set out in the tenancy agreement.

**[6]** By letter dated 5 October 2001 from the plaintiff's then solicitors ("notice to quit"), the plaintiffs did terminate the tenancy by requiring the defendant to quit and deliver vacant possession of the property no later than 31 January 2002. After the expiry of the notice to quit on 31 January 2002, the defendant failed to vacate the property and redeliver vacant possession.

**[7]** The plaintiff then commenced an action in the Sessions Court for recovery of vacant possession of the property, *mesne* profit/double rental, interest, damages, set-off and cost.

## Defendant's Defence

**[8]** The defendant's main ground of defence is that there was an oral agreement between one late Dato' Tan Leok Suan, who was a director and shareholder of the plaintiff, and the defendant; where the defendant claims he was given an option to purchase the property in terms, as follows (hereinafter referred to as "the option"):

(i) That the defendant shall apply to the relevant authority for the conversion of use of the property from residential to commercial use;

(ii) That the defendant shall be entitled to purchase the property at a market value to be determined by a valuer upon receipt of the approval of the relevant authority by the defendant for the conversion of use of the property from residential to commercial use;

(iii) That in consideration of the said option, the defendant shall bear all charges and expenses arising from the said application for the conversion of use of the property regardless of the outcome of the said application.

**Issues**

**[9]** The Sessions Court sealed judgment for the plaintiff. The issues canvassed before the Sessions Court at trial and that needs to be considered by this appellate court are:

(i) Whether the notice to quit was effective and whether the tenancy between the parties had been revived after the issuance of the notice to quit;

(ii) Whether there is sufficient evidence to support the existence of the option or any other agreement;

(iii) If this court were to hold there is insufficient evidence to support the existence of the option, whether the defendant has acquired equity to estop the plaintiff from gaining vacant possession.

**[10]** The issues raised by the defendant (appellant) in the memorandum of appeal substantially relate to the findings of facts by the learned Sessions Court judge. Such findings were made by the learned Sessions Court judge after hearing witnesses from both sides at a full trial.

**[11]** In an appeal which substantially relates to the findings of facts by the trial judge, the Court of Appeal in the case of *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217 had held as follows:

> The learned judge found for the respondents in respect of all the aforesaid issues. The present appeal substantially relates to the findings of fact by the learned judge. The function of an appellate court in hearing an appeal on questions of fact is well established. In *Watt v. Thomas* [1947] AC 484, Lord Thinkerton, in a well known passage of his speech summarises the principles to be adopted as follows:
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> (i) where a question of fact has been tried by a judge without a jury, and there is no misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
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> (ii) the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; and

A (iii) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

B **[12]** Now, keeping in mind the principles of appellate intervention as expounded by the Court of Appeal in the above case, I shall evaluate the findings of the learned sessions judge to see if there is insufficient judicial appreciation of evidence to warrant appellate intervention.

C *Issue (i): Notice To Quit & Revival Of Tenancy*

**[13]** In *Lowenthal v. VanHoute & Anor* 1 KB [1947] 342 Denning J (as he then was) had this to say in respect of revival of tenancy:

D In my opinion the law is now well settled that where a tenancy is determined by a notice to quit, it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect ... On September 23, the tenant offered rent. It was refused by the landlord, showing quite plainly that she was not going to create a new tenancy.

E **[14]** Applying the principle enunciated by Denning J as above, the question to answer based on the evidence adduced is whether the notice to quit is valid and whether there is express or implied agreement creating a new tenancy between the parties here.

**[15]** The defendant was a monthly tenant at the time when the notice F to quit was issued and had been paying rental monthly either by cash or cheque. The plaintiff terminated the defendant's tenancy *vide* notice to quit dated 5 October 2001 giving the appellant three months' notice ie, until 31 January 2002 to quit and deliver vacant possession of the said premises to the plaintiff. The defendant does not dispute receiving G the notice to quit.

**[16]** The plaintiff's solicitors had written to the defendant saying that the plaintiff does not wish to accept any more rental after the notice to quit was issued. However, after the issuance of the notice to quit the defendant had unilaterally banked into the plaintiff's bank account the H sum of RM54,000 towards rental. According to the defendant the payment of this sum of RM54,000 revives the tenancy. The plaintiff refutes this contention. According to the plaintiff, they were not aware that the defendant had deposited the sum of RM54,000 into their bank account. The plaintiff further states categorically that the defendant has

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never ever paid rental by means of directly depositing rent into the plaintiff's bank account. The sum of RM54,000 was then transferred and placed in the plaintiff's solicitors account as stakeholder when the defendant refused to accept the return of the same.

**[17]** The learned Sessions Court judge had addressed her mind to this issue in her judgment. She had held taking into account the totality of the evidence that the unilateral payment of RM54,000 does not revive the tenancy and that the notice to quit is valid and binding on the defendant.

**[18]** In *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 Edgar Joseph Jr SCJ delivering the judgment of the Supreme Court on the question of construing the existence of an agreement held quoting the case of *Smith v. Hughes* [1871] LR 6 QB 597, [1861-73] All ER Rep 632 as follows:

> In *Smith v. Hughes* it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be *ad idem*, ie, there must be a consensus between them.
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> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.
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> In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

**[19]** It is common ground that during the subsistence of the tenancy agreement, the defendant had never banked in any rental payment. Payment had either been in cash or cheque. This was the first time that the defendant had banked in any payment to the plaintiff's bank account. The plaintiff has denied any knowledge or acquiescence in respect of this payment of RM54,000. In fact upon the plaintiff becoming aware of the deposit, the plaintiff offered to return it. The plaintiff's and defendant's conduct and the circumstance surrounding this payment RM54,000 does not show that there is an agreement, be it express or implied, reviving the tenancy.

**[20]** Therefore, the learned sessions judge was right in holding that at no time did the plaintiff or its solicitors ever accept any payment of rental for the period after the notice to quit had expired. A *fortiori* the learned Sessions Court judge had rightly held the notice to quit remains effective and has not been compromised in anyway.

**[21]** In *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1999] 6 CLJ 487, Abdul Hamid Embong J (as he was then) in deciding a similar issue held:

> Learned counsel for the plaintiff referred to two authorities which I accept as stating the correct proposition in law in relation to an acceptance of rental which may amount to a waiver. The first case is *Haji Abdul Hamid v. MK Ramasamy Pillai* [1949] MLJ 15 where Evans J stated:
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> > As I understand the law, acceptance of rent is merely some evidence from which agreement may be inferred where alleged, and where it stands alone may be strong evidence. It is however, evidence and no more. It must be assessed in the light of all the circumstances and relations of the parties. In this case, to infer such agreement in all the circumstances would be manifestly unreasonable.
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> The second case is *Oversea Chinese Banking Corp Ltd v. Eastern Auto Co Ltd* [1961] MLJ 300, a Singapore authority where it was held that:
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> > (1)(a) waiver as operative in cases of tenancies is confined to cases of acceptance of rent after knowledge of a breach of covenant or an obligation of the tenancy and in such instances it is held to be a waiver of the breach or obligation. The breach here was not of a tenancy agreement but of a statutory provision. In such cases, the acceptance of rent with knowledge of the statutory breach could amount to an affirmation of the contractual tenancy and it could not amount to a waiver of the right to invoke jurisdiction of the court for an order for possession under the statutory provision;
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> I am in agreement with the views expressed in both the above cited cases. For a waiver to operate, the act of the landlord in accepting the rental after knowledge of the breach or obligation on the part of the tenant, must amount to a representation to the tenant that the landlord was willing to overlook the breach and that the tenant continued paying the rent in good faith and respecting the landlord's representation. This situation could not be said to exist in this case. Firstly, the said rental deposit was not rent received but merely a deposit for, *inter alia*, the usual utilities usage ie, water and electricity

> and repair charges normally deducted on termination of the tenancy. Secondly, there was no evidence that there was intended that a revised tenancy on fresh terms were to be entered into between LWY and HH. And thirdly, the conduct of the parties, in particular the Respondent in returning the deposit after purchasing the said premises speaks volumes for the situation that HH were treated for what they merely were ie a monthly tenant. There was also not an iota of evidence to show that HH had been misled by the Respondent to remain on the premises as tenants for as long as they wished. It was at the most, wishful thinking on HH's part - and a mere conjecture unsupported by any evidence. It is trite law that the party asserting a fact must prove it. This proposition has now become a statutory burden of proof under s. 101 Evidence Act 1950. (see also *UN Pandey v. Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4). On a balance of probabilities, I find that the Appellants had failed to discharge this burden, and as such, the waiver and estoppel contention by the defence is rejected.

**[22]** Similarly in our case there is no evidence of a fresh tenancy between the plaintiff and the defendant and the conduct of the plaintiff attempting to return the monies deposited in its account clearly shows that there was never any intention on the plaintiff's part to waive the notice to quit. The plaintiff had in fact immediately upon receiving the defendant's solicitors reply to the notice to quit filed this claim in court. It would be manifestly unreasonable to infer any waiver of the notice to quit.

**[23]** As decided in *Abdul Johari*'s case *(supra)*, pursuant to s. 101 of the Evidence Act 1950, the party asserting a fact must prove it on the balance of probabilities. The defendant has failed to discharge this burden and as such the defendant's contention that the plaintiff has revived the tenancy by continuing to receive rental from the defendant cannot stand. The case of *Soon Peng Yam (Pte) Ltd v. Grant Irene Nee Chia Kim Lear* [1984] 1 CLJ 332; [1984] 2 CLJ (Rep) 691 referred to by the defendant is distinguishable on the facts and is not applicable. In that case, the court found that there was oral agreement. That is not the case here.

**[24]** Looking at the circumstance surrounding the deposit of RM54,000 into the plaintiff's bank account and the conduct of the parties after the issuance of the notice to quit, I am satisfied that the learned sessions judge's finding that there is no revival of the tenancy is right in law.

*Issue (ii): Whether There Is Sufficient Evidence To Support The Existence Of The Option To Purchase*

**[25]** The next ground raised by the defendant in the Memorandum of Appeal is that the learned sessions judge purportedly failed to consider the defendant had provided evidence to confirm the existence of an option purportedly granted by the plaintiff to the defendant to buy the property.

**[26]** In respect of this issue, the learned Sessions Court judge had in fact considered the evidence adduced and found that the first time the defendant had raised this issue was in the defendant's solicitor's letter dated 1 February 2002 (exh. P5). This letter was sent three months after the Notice to Quit was issued. There is no document evidencing the option. SP1 had testified that the sole asset of the plaintiff was the property. SP1 owns 50% of the plaintiff. The other 50% is owned by the late Dato' Tan Leok Suan. At the material time both SP1 and the late Dato' Tan were the directors of the plaintiff. The defendant alleges that the option was granted by the late Dato' Tan. SP1 had categorically said that the plaintiff had never given an option to the defendant to purchase the property.

**[27]** The defendant under cross-examination agreed that the issue of an option to purchase the property was first raised in his solicitor's letter dated 1 February 2002 which was written some three months after the notice to quit was served on the defendant. The defendant had not replied to the notice to quit nor to the plaintiff's solicitors' reminder letter dated 18 January 2002 reminding the defendant to deliver vacant possession by 31 January 2002. The defendant claims that sometime in early 2000, the late Dato' Tan had allegedly agreed to grant him an option to purchase the property. However, the defendant had admitted that he had not written to the plaintiff prior to 1 February 2002 letter on the issue of the alleged option notwithstanding his knowing that Dato' Tan had passed away on 11 June 2001. The defendant had also agreed during cross-examination that important transactions should be in writing and that the granting of such an option is an important transaction. He however offered no credible explanation as to why the alleged option to purchase was not reduced to writing. It is quite ironical that despite seeing it fit to have a written tenancy agreement at the material time, the defendant did not see it necessary to have the terms of the alleged option reduced in writing. More so when the defendant was going to expend monies on structural expansion and renovation to the property.

**[28]** In support of the defendant's contention that there exists such an option, the defendant relies on the signature of Dato' Tan and the rubber stamp of the plaintiff company on the layout plan submitted by the defendant to the authorities for planning permission and conversion of category of land use. Whilst the plaintiff does not deny that the signature therein may be Dato' Tan's, the plaintiff argues that the same does not prove the defendant's contention that Dato' Tan had granted an option to purchase the property. The tenancy agreement provides that the defendant shall use the property for commercial purpose. However, the property's category of use then was residential. It is the defendant's responsibility under the tenancy agreement to ensure compliance with laws and regulations affecting the property. This would include obtaining the relevant approvals from the authorities concerned so the property's use can be converted from residential to commercial. In fact under cross-examination, the defendant agreed that pursuant to the terms of the tenancy agreement, in order for him to carry out business on the property, it would be his obligation to obtain planning permission and conversion of use. The late Dato' Tan in signing the plan for planning permission as landowner is merely discharging the plaintiff's obligation under the tenancy agreement to give consent for that application. Taken in this context, the plaintiff's consent to the defendant seeking planning permission for commercial use of the property cannot be construed as supporting the existence of the alleged option.

**[29]** It is the duty of the defendant to prove the existence of such an option on the balance of probabilities. Apart from the defendant's own testimony there is absolutely no evidence to support the defendant's claim. In fact the defendant had in the course of evidence given two conflicting versions of the terms of the option. This contradiction affects the defendant's credibility. The credibility of a witness is best determined by a trial judge who has had the opportunity to hear and see the testimony of the witness. In the circumstance, the learned Sessions Court judge correctly concluded that the defendant's testimony was not credible.

**[30]** It should also be noted that to date the defendant has not filed any claim in court to support his contention that such an option had been granted to him despite ten years having lapsed since the option was allegedly granted by Dato' Tan. As soon as the defendant communicated the same to the plaintiff in 2002 the plaintiff denied the existence of the option and filed this claim. Therefore any cause of action the defendant may have had would be time-barred in 2008. If indeed there was an option to purchase, the defendant ought to have acted on that right. This further supports the plaintiff's contention that the option is non-existent.

**[31]** In the case of *Yii Chee Ming v Teo Ah Khing & Anor* [2007] 4 CLJ 78 the court when confronted by conflicting evidence adopted the following approach:

> What I have before me was two conflicting sets of oral evidences. In dealing with such a situation, I ask myself the question "which version of the events is more reasonable in the circumstances of the case" and in coming to my conclusion, I was guided by what was said in *Tindok Besar Estate Sdn Bhd v. Tinjar Company* [1979] 1 LNS 119; [1972] 2 MLJ 229 by Chang Min Tat, J at p 230:
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> > For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

**[32]** Further, the Court of Appeal in the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 held that:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

**[33]** Applying the legal principles as laid down in above, I am of the opinion that from the analysis of the evidence, both documentary and oral, and taking into account the credibility of the witnesses for both parties there can be only one reasonable conclusion and that is the

alleged option to purchase is an afterthought on the part of the defendant to avoid having to surrender vacant possession of the property as required in the notice to quit. In this regard, the finding of the learned Sessions judge is unimpeachable.

**Issue (iii): Whether The Defendant Has Equity To Estop The Plaintiff From Gaining Vacant Possession**

**[34]** The third main ground raised by the defendant in the Memorandum of Appeal is that the learned Sessions judge purportedly failed to consider the defendant's evidence establishing equitable interest in the property arising from the renovation works carried out and the expenses incurred in respect of the application for conversion of category of land usage. The defendant claims to have carried out two sets of renovations.

**[35]** The first set of renovation works commenced in 1999 and continued in 2000, even before the alleged option to purchase was granted to the defendant by Dato' Tan. The defendant had carried out these renovation works without the approval of the local authority which resulted in the defendant being charged in court for breach of planning and building laws and regulations. The defendant had pleaded guilty to the charge. It was incumbent upon the defendant to submit plans for conversion of use from residential to commercial and to carry out the renovation works in accordance to law. The defendant's failure to do so was in clear breach of the terms of the tenancy agreement.

**[36]** The first renovation works were carried out mainly during the period of the tenancy agreement but the defendant has no record of any written request to the plaintiff or written approval from the plaintiff as required by cl. 4(i) of the tenancy agreement. The fact the renovation works commenced in 1999 goes to show that it had nothing to do with the alleged option which the defendant claims Dato' Tan had given him in early 2000.

**[37]** A scrutiny of the renovation works carried out reveal that the works done were for the defendant's own benefit to enable him to carry out his business on the property. In fact the spray booth, metal roofing and ancillary works were done specifically for the defendant's car repairing business. Clause 4(j) of the tenancy agreements clearly stipulates that all such renovations are to be made and reinstated at the defendant's own costs and these items could be removed when the defendant leaves the property as provided for in the same clause.

**[38]** The defendant cannot now claim any equity in respect of the same in light of cl. 4(i) & (j) of the tenancy agreement. Further, as correctly held by the learned Sessions judge, he who comes to equity must come with clean hands. The defendant has not come clean. The defendant is tainted with acts of illegality and contumelious conduct.

**[39]** The second set of renovation works were carried out in 2005, in total disregard of the notice to quit which had been served. The plaintiff had never given the defendant permission to carry out the said works. Nevertheless the defendant went ahead with the renovation works in 2005. SP3 had testified in court and confirmed that in order to commence development, apart from the planning permission approval, the defendant needed to obtain building plan approval and a commencement of work order from the Majlis Perbandaran Pulau Pinang (MPPP). The defendant under cross-examination also agreed that in order to commence work he needed the building plan and commencement of work approval and without the same he would be subject to prosecution. Further, SP3 had confirmed that without building plan approval and commencement of work order from MPPP, the defendant is not allowed to carry out any works on the property and any structure erected on the property without approval would be illegal. Despite this and despite being represented by an architect at the material time the defendant continued with the renovation works. This was also done in spite of the ongoing dispute between the plaintiff and defendant and the present suit having been filed in the Sessions Court.

**[40]** The MPPP had *vide* letter dated 24 September 2007 (exh. P48) written to the plaintiff confirming that the Building Plan No. 39515(LB) which had been submitted for approval by the defendant had been rejected on 2 August 2007 as there was an ongoing dispute between the plaintiff and defendant.

**[41]** In fact prior to that the MPPP had issued a notice dated 11 August 2005 (exh. P49) pursuant to s. 72(1) of the Street, Drainage & Building Act (SDBA) 1974 requiring the defendant to abstain from proceeding or continuing with the erection of any building on the Property and to demolish such building forthwith.

**[42]** Following the failure of the defendant to comply with the notice dated 11 August 2005, the MPPP had subsequently issued a "Notis Sebelum Meroboh" dated 20 November 2008 (exh. P50) pursuant to s. 72(6) SDBA 1974 giving notice that the MPPP would enter the Property and demolish the illegal structures erected on it and gave the defendant thirty days to comply with the said notice.

**[43]** Despite having his earlier planning permission expire and building plans rejected by the MPPP and receiving notices from MPPP as set out above, the defendant continues to occupy and use the property for his business with all the illegal structures erected on it.

**[44]** I agree with the submissions of counsel for the plaintiff that the defendant cannot now come to court claiming that the renovation works carried out in blatant breach of the law has given him an equitable interest on the property. The defendant's contumelious conduct cannot be countenanced by this court. The principle of *ex turpi causa non oritur actio* applies here. That well established doctrine in common law was explained and applied in the case of *Tay Kian Hock v. Kewangan Bersatu Bhd* [2002] 8 CLJ 982 by Kang Hwee Gee J as follows:

> The doctrine is fairly well established at common law. The principle is described by Lindley LJ in *Scott v. Brown Doering McNab & Co* [1892] 2 QB 724 at 728 as follows:
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> > *Ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality.
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> > It matters not whether the defendant has pleaded the illegality or not. If the evidence is adduced by the plaintiff proves the illegality the Court ought not to assist it. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp 341.

**[45]** The defendant had with open eyes entered into the said tenancy agreement which clearly stipulates at cl. 4 as follows:

> (i) Not to make or permit to be made any alterations in or additions or partitions to the demised premises or to the Landlord's fixtures, fittings and decorations without the previous consent in writing of the Landlord first obtained;
>
> (j) If any alterations or additions or partitions are made to the demised premises with the written consent of the Landlord the Tenant shall at his own costs reinstate the demised premises to its original condition at the expiration or sooner determination of this tenancy if so requested by the Landlord but if no such

A request is made the Tenant shall not remove any alterations or additions or partitions made to the demised premises and shall not be entitled to any payment from the Landlord.

Nevertheless, the defendant chose to disregard his contractual and legal obligations.

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**[46]** The defendant's conduct did not go unchallenged. As soon as the plaintiff's director (SP2) noticed that construction works were being carried out on the property in 2005, she instructed the plaintiff's former solicitors to issue a notice dated 25 August 2005 (exh. P41) to stop such construction works and immediately restore the building to its original state within seven days.

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**[47]** When the defendant failed to comply with this notice (exh. P41), the plaintiff commenced an action at the Penang High Court *vide* Originating Summons No. 24-1388-2005 and had on 15 September 2005 obtained an interim injunction to prohibit the defendant from carrying out any construction works in the property.

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**[48]** In the face of clear breaches of contractual provisions and the law, the defendant cannot now come to court and say that the renovation works have created equitable interest on the property. The defendant is not entitled to claim any equity as a result of the same and the defendant is in fact under an obligation to restore the premises to its original condition upon the expiry or determination the tenancy.

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**[49]** The cases of *Mok Deng Chee v. Yap See Hoi & Ors* [1981] CLJ 124; [1981] CLJ (Rep) 69 and *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19 relied by the defendant is not applicable to the facts of our case as those two cases involved ground tenants. The present case involves a tenancy for a fixed term upon the expiry of which it became a monthly tenancy. The tenancy agreement had a specific clause to reinstate the property to its original condition at the expiration or determination of the tenancy. Further in our case the plaintiff did not stand by and do nothing whilst the plaintiff carried out renovation works. As soon as the plaintiff knew of the works it had objected to the same and gone to court to stop the defendant from carrying on such works. Therefore, I find that there is no active or passive encouragement on the part of the plaintiff as envisaged in *Abdul Johari bin Abdul Rahman*'s case *(supra)* where the court held:

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> Now, even on the lower test of passive encouragement, I am of the view that this was not a situation where the defendants had been encouraged to expend money in expectation of a long tenancy. The RM25,000 was spent so that the defendants could derive an

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> immediate benefit ie the extra bathrooms attached to the bedrooms so that the defendants could operate a hotel according to their specified requirement. To encourage is to do something which would give courage or confidence to the other party. Looking at the circumstances, I can find no evidence to reach a conclusion that LWY had encouraged the defendants into a belief or expectation that they (defendants) would acquire a tenancy for as long as they wished.

**[50]** The case of *Saadian Karim v. Ong Ting Chai* [1996] 1 LNS 96 referred to by the defendant pre-supposes a verbal agreement between parties but in our case no such agreement exits.

**[51]** The learned Sessions judge in her grounds of judgment had in fact considered the issue of the defendant's alleged equitable interest and in the face of the evidence, dismissed it. This finding is well grounded. It is clear that the plaintiff had lawfully terminated the defendant's monthly tenancy and the plaintiff is entitled to vacant possession of the property. The defendant on the other hand has failed to prove the existence of an option to purchase as alleged and neither is he entitled to any compensation as the principle of equitable estoppel does not apply, in the circumstance.

**[52]** The defendant also argues that the learned Sessions Court judge had erred in failing to take into account the sum of RM54,000 banked into the plaintiff's bank account when allowing the plaintiff's claim for *mesne* profits from 1 February 2002. The counsel for the plaintiff argues that the learned judge is not in anyway obliged to take into account the said sum as the defendant's unilateral act of banking in the monies had nothing to do with the plaintiff. Neither did the defendant's counsel in submissions offer to set off the same against the double rental "mesne profit" payable to the plaintiff. Therefore, I agree that on the facts before the court, pursuant to s. 28(4)(a) of the Civil Law Act 1956 the plaintiff is entitled to *mesne* profit or double rental of RM3,600 per month, based on the last rental of RM1,800 per month, from 1 February 2002 until date of delivery of vacant possession.

**[53]** The findings of the Court of Appeal in *Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd & Another Appeal* [1997] 3 CLJ 504 is very much applicable to our case. In that case, the court held that:

> Based on the case law and s. 28(4)(a) of the Civil Law Act 1956, the tenancy was clearly a monthly tenancy and the notice to quit was therefore valid. Once the notice to quit expires, the respondent was holding over; their subsequent delivery of vacant possession only show that they were occupying the premises wrongly.

A The appellants are therefore entitled to double rental after the expiry of the tenancy. The damages sought represent the reimbursement of the interest for the period that the appellants, as a direct result of the respondent's wrongdoing, were deprived of possession of the premises.

B **[54]** This appeal arises from decision made after full trial at the Sessions Court, wherein before making her decision, the learned Sessions Court judge had the benefit of hearing and testimony from both the plaintiff's and defendant's witnesses. The grounds of appeal set forth by the defendant in the Memorandum of Appeal substantially relate to
C findings of fact by the learned trial judge. Based on the principles set out in *Seven Seas* case *(supra)* I do not find any basis to interfere with her findings. The appeal is therefore dismissed with cost. Cost is fixed at RM5,000.

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